United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1352.

THE DISTRICT OF COLUMBIA TO THE USE OF AUGUSTA M. YOUNG, APPELLANT,

vs.

CHARLES B. BALL, WILBUR F. NASH, AND CHARLES D. COLE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 6, 1903.

In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, to the Use of AUGUSTA M. Young, Appellant,
vs.
CHARLES B. BALL ET AL.
No. 1352.

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a Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, to the Use of Augusta M. Young, Plaintiff,
vs.
CHARLES B. BALL, WILBUR F. NASH, and Charles D. Cole, Defendants.
No. 46118. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration.*

Filed March 28, 1903.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, to the Use of Augusta M. Young,
vs.
CHARLES B. BALL, WILBUR F. NASH, and Charles D. Cole.
Law. No. 46118.

1. The plaintiff, The District of Columbia, to the use of Augusta M. Young, sues the defendants Charles B. Ball, Wilbur F. Nash and Charles D. Cole, for that the defendants by their certain writing obligatory sealed with their seals and dated the 26th day of November A. D. 1894, wherein is recited the appointment of said Charles B. Ball to the office of inspector of plumbing in and for the District of Columbia acknowledged themselves bound unto the plaintiff in the sum of $5000.00 conditioned for the faithful and efficient per-

formance by the said Charles B. Ball of all the duties of the office of the inspector of plumbing in and for the District of Columbia, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District, and for the payment, disbursement and accounting for all moneys that should come to his hands as the law and orders governing said services shall require; and the defendant Charles B. Ball did not faithfully and efficiently perform all of the duties of the office of inspector of plumbing in and for the District of Columbia as provided for by law and the rules and regulations from time to time
2 duly prescribed for the government of the civil service of said District. And the said Augusta M. Young has been and is now aggrieved by his neglect so to do; in that heretofore to-wit: in the month of July A. D. 1899, one Horace T. Jones, being the owner of lots 72 and 73 of a sub-division of original lot 4 in square 44 in the city of Washington, D. C. began the erection and construction of two houses upon said lots, and said houses were finished on to-wit: April 10, 1900; that it became and was the duty of said defendant Charles B. Ball during the erection and construction of the houses aforesaid, he being then the inspector of plumbing in and for the District of Columbia to inspect or cause said houses to be inspected to see that the plumbing connecting said houses with the public sewerage system of the District of Columbia conformed to the plumbing regulations and laws of the District of Columbia, and to see that said houses were properly and lawfully connected with the public sewerage system of the District of Columbia, but the said Charles B. Ball, inspector as aforesaid, did not during the erection of said houses, or at any time inspect or cause to be inspected said houses and see that they were connected with the public sewerage system of the District of Columbia, but so to do wholly failed and neglected, and said houses were not in fact connected with the public sewerage system of the District of Columbia in the manner prescribed by the plumbing regulations and the laws of the District of Columbia, but were connected therewith negligently and in a manner prohibited by law and in violation of said plumbing regulations and the laws of the District of Columbia. That said houses were sold and conveyed by the said Horace T. Jones to the
3 plaintiff Augusta M. Young, on the 14th day of April, A. D. 1900, and possession thereof was delivered to the said Augusta M. Young, and that at the time said Augusta M. Young bought said houses and took possession thereof, she had no notice, actual or constructive, express or implied, of the condition of the plumbing connecting said houses with the public sewerage system of the District of Columbia; and on to-wit: February 27, 1901, the said plumbing being then and at that time in the same condition it had always been since it was first put down and connected, the said Charles B. Ball, inspector as aforesaid, through his agents, servants and subordinates, wrongfully and unlawfully condemned the said plumbing and disconnected said houses from said plumbing so that there was and is no outlet for the sewerage flowing from said houses, and noti-

fied the said Augusta M. Young that the further use or occupation of said houses would constitute a nuisance and would be prosecuted as such, thereby rendering said houses useless and unfit for habitation to the loss and damage to the plaintiff of the sum of $5000.00, and the plaintiff claims the sum of $5000. besides costs.

2. The plaintiff, The District of Columbia to the use of Augusta M. Young further sues the defendants, Charles B. Ball, Wilbur F. Nash and Charles D. Cole for that the defendants by their certain writing obligatory sealed with their seals and dated the 26th day of November, A. D. 1894, wherein is recited the appointment of Charles B. Ball to the office of inspector of plumbing in and for the District of Columbia acknowledged themselves bound unto the plaintiff
4 in the sum of $5000.00, conditioned for the faithful and efficient performance by the said Charles B. Ball of all the duties of the office of the inspector of plumbing in and for the District of Columbia, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District, and for the payment, disbursement and accounting for all moneys that should come to his hands as the law and orders governing said services shall require; and the defendant Charles B. Ball did not faithfully and efficiently perform all of the duties of the office of inspector of plumbing in and for the District of Columbia as provided for by law and the rules and regulations from time to time duly prescribed for the government of the civil service of said District. And the said Augusta M. Young has been and is now aggrieved by his neglect so to do; in that heretofore to-wit, on the 27th day of February, A. D. 1901, the said Augusta M. Young being the owner of and in possession of the land and premises known as lots 72 and 73 of a subdivision of original lot 4 in square No. 44 in the city of Washington, D. C., the defendant Charles B. Ball acting as inspector of plumbing aforesaid, through his agents, servants and subordinates wrongfully and unlawfully entered upon the premises aforesaid and disconnected the plumbing connecting the houses erected on said premises with the plumbing connecting said houses with the public sewer, so that there was and is no outlet for the sewerage flowing from said houses, and notified the said Augusta M. Young that the further use or occupation of said houses would constitute a nuisance and would be prosecuted as such, thereby rendering them useless and unfit for habitation to the loss and damage of the plaintiff of the sum of $5000.00.

5 And the plaintiff claims the sum of $5000.00 besides costs.

EUGENE A. JONES,
Attorney for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

EUGENE A. JONES,
Plaintiff's Attorney.

Demurrer.

Filed June 12, 1903.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, to the Use of Augusta M. Young,
vs.
CHARLES B. BALL, WILBUR F. NASH, and CHARLES D. COLE.
} At Law. No. 46118.

Now comes the defendant, Wilbur F. Nash, and craves oyer of the writing obligatory in the declaration of the plaintiff mentioned and the same is produced and read to him, and is as follows:

6 Know all men by these presents, that we, Chas. B. Ball, Wilbur F. Nash, Chas. D. Cole, of the District of Columbia, are held and firmly bound unto the District of Columbia, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said District of Columbia, or to the certain attorney, successor, or assigns thereof; for which payment, well and truly to be made, we and each of us do bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 26th day of November A. D. one thousand eight hundred and ninety-four.

Whereas, the above bounden Chas. B. Ball has been appointed to the office of inspector of plumbing in and for the District of Columbia. Now therefore, the condition of said obligation is such that if said Chas. B. Ball shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force.

CHAS. B. BALL. [SEAL.]
WILBUR F. NASH. [SEAL.]
CHAS. D. COLE. [SEAL.]
DANIEL FRASER. [SEAL.]

Signed, and sealed in the presence of—

WALTER C. ALLEN,
PAUL L. WEBB,
For Daniel Fraser.

Approved: December 1, 1894.

JOHN W. ROSS,
GEO. TRUESDELL,
CHAS. F. POWELL,
Commissioners of the District of Columbia.

Correct as to form

S. T. THOMAS,
Attorney, D. C.

7 Whereupon the said defendant demurs to each count of said declaration and says that each count thereof is bad in substance.

Note.

Among other matters to be urged in support of the above demurrer are the following:

First. There is no law existing in the District of Columbia which authorizes the bringing of a suit to the use of a third party in the name of the obligee on a bond given to the District of Columbia.

Second. That there is no privity between the District of Columbia and the use plaintiff, or between the use plaintiff and any of the defendants named in the above entitled cause, such as would entitle the District to maintain a suit for the use plaintiff.

Third. That the bond above set out is not one required by law, but is a voluntary bond given only for the use and benefit of the obligee named therein, to wit, the District of Columbia.

Fourth. That no cause of action is stated in either count of plaintiff's declaration against the defendants named therein, or any of them.

E. H. THOMAS,
HARRY G. KIMBALL,
Attorneys for Defendant Nash.

8 Supreme Court of the District of Columbia.

MONDAY, *June* 29, 1903.

Session resumed pursuant to adjournment, Mr. Justice Anderson, presiding.

THE DISTRICT OF COLUMBIA, to Use of AUGUSTA M. Young, Plaintiff, *vs.* CHARLES B. BALL, WILBUR F. NASH, and CHARLES D. Cole, Defendants.	At Law. No. 46118.

The defendant, William F. Nash having demurred to the declaration, and said demurrer having been heard, and sustained, by

Mr. Justice Barnard, with leave to the plaintiff to elect whether she will amend her declaration or stand upon the declaration, now comes into court and announces her election to stand upon the declaration:

Therefore, it is considered that the plaintiff take nothing by her suit against Wilbur F. Nash, and that he go thereof without day, and recover against the plaintiff his costs of defense to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and is allowed to deposit the sum of $50.00 with the clerk of this court in lieu of a bond.

Memorandum.

June 29, 1903.—$50. deposited by plaintiff in lieu of appeal bond.

9 *Order for Transcript.*

Filed June 29, 1903.

In the Supreme Court of the District of Columbia, the 29th Day of June, 1903.

DISTRICT OF COLUMBIA, to Use, &c.,
vs.
CHARLES B. BALL ET AL. } At Law. No. 46118.

The clerk of said court will please make transcript of record on appeal to the Court of Appeals and include therein

The declaration,

" demurrer, and judgment of this court.

EUGENE A. JONES,
Attorney for Plaintiff.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 46,118, at law, wherein the District of Columbia to the use of Augusta M. Young is plaintiff, and Charles B. Ball, *et al.*, are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16″ day of July, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia, supreme court. No. 1352. The District of Columbia, to the use of Augusta M. Young, appellant, *vs.* Charles B. Ball *et al.* Court of Appeals, District of Columbia. Filed Jul- 17, 1903. Robert Willett, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1352.

THE DISTRICT OF COLUMBIA, TO THE USE OF AUGUSTA M. YOUNG, APPELLANT,

vs.

CHARLES B. BALL, WILBUR F. NASH, AND CHARLES D. COLE.

Brief for Wilbur F. Nash, Appellee.

E. H. THOMAS,
HARRY G. KIMBALL,
WM. HENRY WHITE,
Attorneys for Appellee Nash.

LAW REPORTER PRINT, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1352.

THE DISTRICT OF COLUMBIA, TO THE USE OF AUGUSTA M. YOUNG, APPELLANT,

vs.

CHARLES B. BALL, WILBUR F. NASH, AND CHARLES D. COLE.

Brief for Wilbur F. Nash, Appellee.

Statement of the Case.

By an act of Congress approved April 23, 1892 (27 Stat. 21), entitled An act to authorize the appointment of an inspector of plumbing in the District of Columbia, and for other purposes, the Commissioners of the District of Columbia (sec. 1) were—

> "authorized and empowered to make, modify, and enforce regulations governing plumbing, house drainage, and the ventilation, preservation, and maintenance in good order of house sewers and public sewers in the District of Columbia, etc."

(NOTE.—By act approved January 25, 1898, the provisions of the act approved April 23, 1892, were "extended to include the practice of gas fitting in the District of Columbia.")

No provision was made in the act of April 23, 1892, requiring the inspector of plumbing to give bond, but by section 2 of that act the Commissioners were—

> "authorized and empowered to require every person licensed to practice the business of plumbing in the District of Columbia, before engaging in the said business, to file a bond . . . conditioned upon the faithful performance of all work in compliance with the plumbing regulations, and that the District of Columbia shall be kept harmless from the consequence of any and all acts of the said licensee during the period covered by said bond."

By section 4 of the act of April 23, 1892, it is provided:

> "That the inspector of plumbing and his assistants shall be under the direction of the Commissioners, and they are hereby empowered accordingly to inspect or cause to be inspected all houses when in course of erection in said District, to see that the plumbing, drainage, and ventilation of sewers thereof conform to the regulations hereinbefore provided for; and also, at any time during reasonable hours, under like direction on application of the owner or occupant or the complaint under oath of any reputable citizen, inspect or cause to be inspected any house in said District, to examine the plumbing, drainage, and ventilation of the sewers thereof and generally to see that the regulations hereinbefore provided for are duly observed and enforced."

By section 2 of the act of June 18, 1898 (30 Stat. 477), it is the duty of the plumbing board to examine all applicants for license as master plumbers or gas fitters, etc.; and by section 5 of the same act it is provided:

> "That it shall be unlawful for any person to engage in the work of plumbing or gas fitting in the District of Columbia unless he is licensed as provided in this act, or is an employee of a licensed master plumber."

By section 6 it is provided:

> "That it shall be unlawful for the owner or lessee of any building in the District of Columbia, or the agent or representative of such owner or lessee, to knowingly employ any unlicensed person to do plumbing or gas fitting in and about such building."

The Commissioners of the District of Columbia, pursuant to the authority of Congress, adopted and promulgated plumbing regulations and defined therein the duties of the inspector of plumbing in section 3, which provides:

> "It shall be the duty of the inspector of plumbing, under the direction of the Commissioners, to inspect, or cause to be inspected by his assistants, all houses when in course of erection in said District, to see that the plumbing, drainage, and ventilation of sewers thereof conform to these regulations. It shall be his duty at any time during reasonable hours, under like direction, on application of the owner or occupant, or the complaint under oath of any reputable citizen, to inspect or cause to be inspected any house in said District, and to examine the plumbing, drainage, and ventilation of the sewers thereof."

The regulation then proceeds to provide that when defects in plumbing have been found they are to be remedied upon service of the notice, provided that if the owner, agent, or tenant shall file protest in writing against the required changes or deposit $20 to cover the expense of re-examination, then the Engineer Commissioner will designate three inspectors to make re-examination, and if the Engineer Commissioner shall approve a decision against the exceptant, the Commissioners shall cause said exceptant to be notified of the decision and the work ordered by the inspector of plumbing to be begun and completed within a reasonable time.

If the owner or agent refuse or neglect to comply with the order after notice, then it shall be the duty of the inspector of plumbing to report the same to his immediate superior.

And by section 6 it is provided—

> "That the inspector of plumbing shall make oath that he will faithfully perform the duties of his office, and shall, before entering upon said duties, execute a bond to the District of Columbia in the sum of $5,000, with three sureties, to be approved by the Commissioners, conditioned for the faithful performance of the duties of his office and for the benefit of all persons who may be aggrieved by his acts of neglect."

Charles B. Ball, who was not served with process and is not an actual party to this suit, was appointed inspector of plumbing and gave the bond sued on with Charles D. Cole, Daniel Fraser (neither of whom are parties), and the appellee, Wilbur F. Nash, as sureties (Rec. p. 4).

The appellant, Augusta M. Young, has brought suit against the appellee on said bond in the name of the District of Columbia without any authority, and has filed her declaration in two counts.

The first count alleges (Rec. pp. 2 and 3):

> "In the month of July, A. D. 1899, one Horace T. Jones, being the owner of lots 72 and 73 of a subdivision of original lot 4 in square 44 in the city of Washington, D. C., began the erection and construction of two houses upon said lots, and said houses were finished on to wit: April 10, 1900; that it became and was the duty of said defendant, Charles B. Ball, during the erection and construction of the houses aforesaid, he being then the inspector of plumbing in and for the District of Columbia, to inspect or cause said houses to be inspected to see that the plumbing connecting said houses with the public sewerage system of the District of Columbia conformed to the plumbing regulations and laws of the District of Columbia, and to see that said houses were properly and lawfully connected with the public sewerage system of the District of Columbia, but the said Charles B. Ball, inspector as aforesaid, did not during the erection of said houses, or at any time,

inspect or cause to be inspected said houses and see that they were connected with the public sewerage system of the District of Columbia, but so to do wholly failed and neglected, and said houses were not in fact connected with the public sewerage system of the District of Columbia in the manner prescribed by the plumbing regulations and the laws of the District of Columbia, but were connected therewith negligently and in a manner prohibited by law and in violation of said plumbing regulations and the laws of the District of Columbia. That said houses were sold and conveyed by the said Horace T. Jones to the plaintiff, Augusta M. Young, on the 14th day of April, A. D. 1900, and possession thereof was delivered to the said Augusta M. Young, and that at the time said Augusta M. Young bought said houses and took possession thereof, she had no notice, actual or constructive, express or implied, of the condition of the plumbing connecting said houses with the public sewerage system of the District of Columbia; and on to wit: February 27, 1901, the said plumbing being then and at that time in the same condition it had always been since it was first put down and connected, the said Charles B. Ball, inspector as aforesaid, through his agents, servants and subordinates, wrongfully and unlawfully condemned the said plumbing and disconnected said houses from said plumbing so that there was and is no outlet for the sewerage flowing from said houses, and notified the said Augusta M. Young that the further use or occupation of said houses would constitute a nuisance and would be prosecuted as such, thereby rendering said houses useless and unfit for habitation."

The second count in the declaration omits the conveyance mentioned in the first count and avers—

"That heretofore, to wit, on the 27th day of February, A. D. 1901, the said Augusta M. Young being the owner of and in possession of the land and premises known as lots 72 and 73 of a subdivision of original lot 4 in square No. 44 in the city of Washington, D.C., the defendant, Charles B. Ball, acting as inspector of

> plumbing aforesaid, through his agents, servants and subordinates wrongfully and unlawfully entered upon the premises aforesaid and disconnected the plumbing connecting the houses erected on said premises with the plumbing connecting said houses with the public sewer, so that there was and is no outlet for the sewerage flowing from said houses, and notified the said Augusta M. Young that the further use or occupation of said houses would constitute a nuisance" (Rec. p. 3).

The appellee Nash (defendant below) demurred to each count of the declaration (Rec. pp. 4 and 5), and this demurrer was sustained with the resulting judgment in favor of the appellee upon the election of the appellant to stand upon the present declaration without amendment (Rec. pp. 5 and 6).

POINTS OF LAW.

I.

The First Count of the Declaration Shows That the Negligence Charged Against the Building Inspector Was at a Time When He Was Under No Duty Whatever to Use Plaintiff, Because She Was Not the Owner of the Property at the Time of the Alleged Breach of Duty.

The case presented is one of *contract*, i. e., the bond, which is made to the municipality only and does not in terms purport to be for the benefit of any third party.

True, the plumbing regulations say (sec. 6), outside of the obligation itself, that such bond shall be "for the benefit of all persons who may be aggrieved by his acts of neglect."

Reading this regulation into the bond still results in a case of *contract*.

The breach alleged is that during the erection of the

houses, before April 10, 1900, the duty to inspect was imposed. After the injury had occurred the use plaintiff purchased after full inspection, presumably, and took the houses subject to their defects. The duty of inspection as to said plaintiff did not exist, as shown by the first count.

> "It is hardly necessary to observe that if NO property or interest in the subject-matter of the suit be stated in the declaration to have existed, or been vested in the plaintiff at the time the wrong was committed, the omission will be fatal even after verdict; the objection being the total *omission*, not the *defective statement*, of a title."
>
> 1 Chitty Pleading, 379.

II.

The Second Breach Contained in the First Count that the Inspector of Plumbing Wrongfully Condemned the Plumbing, and the Breach in the Second Count that he Wrongfully Disconnected the Same, Afford No Ground of Action.

There is no allegation that the plumbing inspector failed to act in accordance with the plumbing regulations. It is therefore presumed that he acted under them. This action complained of could only have been done by the inspector of plumbing under the orders of the Commissioners.

The last clause of section 3 of the plumbing regulations provides:

> "Should the owner or agent of the premises ordered to be repaired neglect or refuse to comply with the order within a reasonable time, after ten days' notice, it shall be the duty of the inspector of plumbing *to report the same to his immediate superior.*"

The said breaches, then, are but mere conclusions of the pleader without any matters of inducement to support them.

Where the powers of overseers were subordinate to and

under the control of commissioners of highways, if a civil action will lie, a declaration after a verdict which failed to state specially the cause of action, is bad. The court said:

> "It ought to have stated specially every fact requisite to enable the court to judge whether there has been a breach of duty. . . . The declaration in this case states, generally, that the overseer neglected his duty and wilfully suffered a bridge to remain broken, by means of which the plaintiff sustained an injury. This was not enough. There is no special duty charged, nor are the facts stated from which a breach of duty is to be inferred."

Bartlett *vs.* Crozier, 17 Johns. 439.

III.

Under the Statute and Regulations the Right of Action, if Any Exists, is Against the District of Columbia or the Plumber Who Did the Work, and Not Against the Inspector of Plumbing.

The object of the act of Congress was to enable the municipal authorities to secure proper sewerage and drainage. For such purpose none but duly qualified and licensed plumbers were permitted to engage in their occupation, and the statute empowered the Commissioners to require bond of every person licensed to practice the business of plumbing conditioned for the faithful performance of all work in compliance with the plumbing regulations, and that the District of Columbia shall be kept harmless from the consequence of any and all acts of said licensee during the period covered in his bond.

The statute placed the inspector of plumbing and his assistants under *the direction of the said Commissioners.*

It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty. It is not sufficient to show a general public duty or a duty to some other person directly

interested, for the public officer is liable on his bond only to the party to whom he is bound by the duty of his office.

State *vs.* Harris, 89 Ind. 363.
Savings Bank *vs.* Ward, 100 U. S. 195.
Cragin *vs.* Lovell, 109 U. S. 198, 199.
National Bank *vs.* Grand Lodge, 98 U. S. 123.

So an overseer of the poor can not be sued by a pauper for his support because his action was a breach of public duty.

Van Nuis *vs.* M'Collister, 3 N. J. L. 371.

The commissioners of the roads are not liable to a private action for neglect of duty.

Young *vs.* Commissioners, 2 Nott & M. (S. Car.), 537.
McConnell *vs.* Dewey, 5 Neb. 385.
Bartlett *vs.* Crozier, 17 Johns. 439.

The District of Columbia might be liable for the negligence of the inspector of plumbing because power is vested in him, not as individual or as an independent public officer, but for the reason that the grant is a part of the municipal power.

Conrad *vs.* Trustees, 16 N. Y. 158 and note at p. 162.

If the duty was imposed for the benefit of another person or class of persons, and the complainant's advantage from its discharge is merely incidental, and not a part of the design of the statute, no such right is created as forms the subject of an action at law or of a suit in equity. The usual provision in city charters that contracts for public work shall be awarded to the lowest reliable and responsible bidders was not enacted to furnish employment for contractors, or to benefit a bidder for such work, but with the

design to benefit and protect the property holders and tax payers of the municipalities.

The lowest reliable and responsible bidder for a contract for public work has no such vested or absolute right to a compliance with such provisions of the statutes as will enable him to maintain an injunction against their violation by public officials, because these provisions of the statute were not enacted for his benefit, or for the benefit of his class.

Colorado Pav. Co. *vs.* Murphy, 78 F. R. 28.

The plaintiff must show that the defendant owed the duty to him personally.

Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action.

Strong *vs.* Campbell, 11 Barb. 135, 138.

The declaration shows (Rec. bottom p. 2) that—

> "said houses were not in fact connected with the public sewerage system of the District of Columbia in the manner prescribed by the plumbing regulations and the laws of the District of Columbia,"—

so that in disconnecting such plumbing the inspector was simply performing his duty.

His action, we submit, was quasi judicial in its nature and the inspector can not be subjected to suit therefor.

IV.

The District of Columbia Had No Power to Make the Regulation Requiring the Inspector of Plumbing to Give the Bond in Suit for the Benefit of Any Third Party.

Congress did not require a bond of the inspector of plumbing and did not authorize the Commissioners to exact one from him.

> "The power to license auctioneers, and to take bonds for their good behavior in office not being one of the incidents to a corporation, must be conferred by an act of the legislature; *and in executing it, the corporate body must conform to the act.*"
>
> Per Ch. J. Marshall in Fowle *vs.* Alexandria, 3 Pet. 407.

> "If the common council was not required or enabled by law to take a bond, the action can not be sustained."
>
> Id. 409.

> "That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."
>
> Id. 409.

The corporation has no power to pass an act offering a reward for the apprehension of a criminal.

> Baker *vs.* City, 7 D. C. 134.

"Where, however, they act outside of the premises their power ceases."

> "They do act outside of the premises whenever they undertake to do that which is foreign to the purposes of their creation"

Id. 139.
Bates *vs.* D. C., 1 MacA. 433.
In re Hennick, 5 Mackey, 502.
Roach *vs.* Van Riswick, 7 W. L. R. 496.
Stoutenburgh *vs.* Hennick, 129 U. S. 141.
Johnson *vs.* D. C., 6 Mackey, 21.

Thus the Commissioners have no power to submit a claim to arbitration.

D. C. *vs.* Bailey, 171 U. S. 161–176.

> "Counties, cities, and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the State."

Mt. Pleasant *vs.* Beckwith, 100 U. S. 514.

> "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant.
>
> "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.
>
> "A forced interpretation the court is not at liberty to give.

"If the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall."

Minturn *vs.* Larue et al., 23 How. 435.

"The power granted to a municipality to enact ordinances is special and delegated and must therefore be strictly construed, and any reasonable doubt as to the existence of the power claimed should be resolved against the municipality."

21 Ency. Law, 2d ed. 950.

V.

The Bond Is Not Good as a Voluntary Bond.

The contract contained in the bond was not made with the use plaintiff.

The bond has two purposes, one the faithful and efficient performance of all the duties of his office, and the other that he will well and truly pay over, disburse, and account for all moneys. It is given to the District of Columbia, and nowhere does it recite or indicate that it is for the benefit of any other person whatsoever.

"It is reasonably clear, however, that where the contract was entered into primarily for the benefit of the parties thereto, the mere fact that a third person would derive an incidental benefit from its performance will not entitle him to sue for a breach thereof. It is indispensable to a beneficiary's right of action that the contract appear to have been for his benefit."

15 Am. & Eng. Enc. P. & P. 516–517.

If the bond had been given to the United States for its benefit or for the wards of the nation a different rule might prevail.

U. S. *vs.* Pumphrey, 11 App. Cases D. C. 44.
Tyler *vs.* Hand, 7 How. 573.

But in U. S. *vs.* Pumphrey it is said:

> "It must be conceded, however, that if the United States had no special power of supervision and control over the privileges and interests of these Indians, as such, the bond would be invalid."
>
> U. S. *vs.* Pumphrey, 11 App. Cases D. C. 49.

No person who is not the proprietor of an obligation can have a legal right to put it in suit unless such right be given by the legislature, and no person can be authorized to use the name of another without his assent given in fact or by legal intendment.

Washington *vs.* Young, 10 Wheat. 409.

In Harshman *vs.* Winterbottom, 123 U. S. 220, the defendant gave his bond to the State of Missouri as collector of taxes that he would faithfully and punctually collect and pay over all State, county, and other revenue and for the faithful performance of his duty. The declaration charged that that plaintiff held warrants of the county which were presented to the treasurer, but were not paid because there was no money in the treasury; that the county had issued a large number of warrants which, under the law, might be used by any holder in paying his individual taxes, but that the collector received these warrants from persons in payment of other taxes than that due by the holders of the warrants, as a result of which no money was paid into the county treasury for two years; that this was a breach of the covenant in his bond to "faithfully perform all the duties of his said office" by reason of which plaintiff could not collect his warrant from the treasurer. The opinion states:

> "The actual plaintiff, Harshman, for whose use this action was brought, shows no relation of contract

> or legal obligation between Winterbottom and himself, on which he has a right to bring suit,"

and the court points out that he might have a remedy—

> "in case of fraud or conspiracy, or by way of mandamus . . . by way of garnishee process or attachment (under statute) or by a bill in chancery. The want of privity between Harshman and the obligors in the bond on which they are sued is established by the decision of this court in Savings Bank *vs.* Ward, 100 U. S. 202."

See McRea *vs.* McWilliams, 58 Texas, 328, where the bond was given by the defendant to the Postmaster-General covenanting for the faithful performance of duties of himself as a contractor to carry the mails, and expressly makes the defendant liable for the conduct of the carriers under his charge. One of these carriers broke open a sack and destroyed a letter belonging to the plaintiff, whereby she was damaged to the extent of $200.

In 6 Vt. 101, 105, the bond of a sheriff was given to the State of New Hampshire. The sheriff failed to collect the money on an execution in favor of one Moore. The court held that even if this action might have been maintained under the statute in New Hampshire it could not under the common law in Vermont, even if Moore had been the plaintiff.

> County *vs.* Bushnell, 15 Oreg. 169, 170, 171, also states the common law.

In the court below reliance was placed by the attorney for the plaintiff Young on the following Maryland cases:

> M'Mechen *vs.* Mayor, 2 H. & J. 41.

(This case was dissented from in Washington *vs.* Young, 10 Wheat. 409, and the decision is based on a confession of judgment.)

> M'Mechen *vs.* Mayor, 3 H. & J. 534.

(There is no opinion in this case, but evidence was offered to show that the mayor had authorized the suit.)

State *vs.* Dorsey, 3 G. & J. 75.

(NOTE.—The Levy Court had legislative authority to require bond *in the name of the State* of the collector of taxes and the suit was in the name of the State to the use of the Levy Court.)

Ing *vs.* State, 8 Md. 288.

(Appeal bond taken in the name of the State as provided by statute, p. 295.)

State *vs.* Norwood, 12 Md. 177.

(This was a suit on an official bond of a clerk of the Court of Common Pleas for the city of Baltimore for the use of the city of Baltimore, whose official he was.)

But in any event these decisions constitute simply a rule in the State of Maryland and, as conceded in the above case of State *vs.* Norwood, are contrary to the ruling of the Supreme Court of the United States in like case relating to the District of Columbia.

We respectfully submit that the demurrer is well founded and that the judgment of the court below should be affirmed.

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